No. 21949

IN THE

United States Court of Appeals For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

SOUTH BAY DAILY BREEZE, A DIVISION OF SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, INC., *Respondent*.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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IEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the Nahal Labor Relations Board for enforcement of its er issued on October 12, 1966, against the South y Daily Breeze, A Division of Southern California sociated Newspapers, Inc.,[1] hereafter referred to as e Company" or "Respondent." The order was

[1] The Southern California Associated Newspapers, Inc., is owned he Copley Press which owns 10 newspapers in Southern Calia and 5 in Illinois (Tr. 779).

issued following the usual unfair labor practice pro ceedings under Section 10 of the National Labor Rela tions Act, as amended (61 Stat. 136, 73 Stat. 519, 2 U.S.C., Sec. 151, *et seq.*). The Board's decision an order (R. 143-44)[2] are reported at 160 NLRB No. 14

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Company violated Se tion 8(a)(1) of the Act by threatening employee with blacklisting, loss of benefits and discharge b cause of their union activities, by promising an granting wage increases in order to discourage unio activities, by giving employees the impression of su veillance of union activities, and by interrogating em ployees regarding their union activities. The Boa also found that the Company violated Section 8(a)(5 and (1) of the Act by refusing to recognize and ba gain collectively with the Union[3] and by unilateral granting wage increases to employees. The facts up which these findings are based are set forth belo

A. A Majority of Editorial Employees Join the Guild But t Company Refuses the Guild's Request for Recognition

The Company publishes a daily newspaper, t South Bay Daily Breeze, in Torrance, California. C

[2] References to the pleadings reproduced as Volume I, Pleadi are designated "R". References to the stenographic transcript the hearing filed with the Court are designated "Tr." Referen preceding a semicolon are to the Board's findings; those followi are to the supporting evidence. References designated "G.C. Exh or "R. Exh." are to exhibits of the General Counsel and respon ent, respectively.

[3] Local 69, Los Angeles Newspaper Guild, American Newspa Guild, AFL-CIO, CLC, hereafter referred to as "Guild" "Union".

pril 21 or 22, 1965,[4] Loel Schrader, an international
epresentative for the Guild, was informed by a Guild
ember that editorial employees of the Company were
terested in union representation (R. 68; Tr. 21-22,
). On Friday, April 23, Schrader met with employees
illis, Rinehart, and Butkus and discussed with them
e advantages of Guild representation (R. 68; Tr.
, 60). He then told the employees how to go about
tting representation; that membership cards would
needed from at least 30 per cent of the employees
order to get a Board election; that it was possible
get recognition without an election if a majority
came members but that the Guild would want at
ast 70 per cent of the employees signed up before
would try to get representation without an elec-
n (R. 68; Tr. 47-48). The three employees then
gned authorization cards and it was agreed that
illis and Rinehart would solicit the remaining em-
oyees during the weekend (*ibid*). By Sunday eve-
ng 12 more cards were turned over to Schrader thus
ving him a total of 15 cards—a majority of the 25
ployees in the unit (R. 68; Tr. 26, 52-54).[5] Schrader
en sent the following telegram to the Company
questing recognition:

> Editorial dept. employees of the South Daily Breeze have designated the Los Angeles Newspaper Guild as their representative for the pur-

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[4] All dates refer to 1965 unless otherwise noted.

[5] Following a representation hearing in which the eligibility of tain employees was litigated, the Regional Director, on June 30, ided that there were 25 employees in the unit. Prior to that e the Guild had taken the position that the unit consisted of 20 ployees while the Company sought to have 28 employees in- ded in the unit (GCX 1(d)).

pose of bargaining collectively for improved wages, hours and other terms and conditions of employment. The Guild requests that it be granted recognition as bargaining representatives for editorial dept. employees. In the event you do not voluntarily grant recognition the Guild will insist that a secret ballot election be conducted among all eligible employees by the National Labor Relations Board. The Guild expects that the Daily Breeze will continue to act in a gentlemanly fashion and employees will not be impeded in their exercise of free choice by threats, interrogation or promises. In this regard the Guild calls your attention to appropriate sections of the Labor Management Relations Act. Any attempts by the Daily Breeze to go beyond the proper bounds of pre-election conduct will be dealt with swiftly by the Guild's legal dept. The Guild's only concern is that eligible employees be given an opportunity to act, speak and vote in accordance with their own free consciences and without fear of retaliation from either party (R. 69; G.C. Exh. 7).

On Monday, April 26, Schrader filed a representation petition with the Board, and on the following day respondent received notification from the Regional Office of the Board of this fact (R. 69; Tr. 795, G.C. Exh. 1(a)).

On April 27, 1965, Robert L. Curry, publisher and editor of Respondent dispatched the following telegram to Schrader:

> In response to your telegram of April 26, I wish to advise you that the South Bay Daily Breeze declines to recognize your union as the collective bargaining representative of any of its employees

because it genuinely doubts that your union represents a majority of its employees in any appropriate bargaining unit. We further believe that the proper way to resolve these questions is through a secret ballot election conducted under the provision of the National Labor Relations Board provided you meet the requirements of the National Labor Relations Board for such an election (R. 69; R. Exh. 12).

The next day, April 28, Schrader visited Curry at his office and told him that he represented the employees in the editorial department (R. 69; Tr. 34-35). He referred to a previous election to have the Guild represent the circulation department and suggested that they could avoid the bitterness and disruption of an election campaign by agreeing at that point to sit down and negotiate a contract (R. 69; Tr. 35). Curry replied that the matter was entirely out of his hands as it had been turned over to counsel (R. 69; Tr. 35). Curry added that he doubted that the Guild represented a majority of the employees (R. 69; Tr. 35).

B. The Election Campaign: Company Officials Interfere With, Restrain and Coerce the Employees in Order To Defeat the Guild in the Election.

1. News Editor Kenneth Johnson

On April 26, shortly after the Company received the telegram from the Guild, Johnson approached Gillis and asked him if he was "with him or against him" (R. 71; Tr. 74-76). When Gillis said that he did not understand, Johnson asked if he had signed a petition; Gillis answered that he had not (R. 71; Tr. 76). Johnson then related that his father had been a union

organizer and that he knew their tactics and that these things had turned him against unions in general. He also said that Gillis would not like working with the Guild because it would ruin the paper (ibid.).

Later that day, Johnson showed the telegram to employee Patricia McDonnell, women's editor, and asked if she were one of the people responsible for it (R. 71; Tr. 470-71). Johnson stated that he felt it was a personal affront and that he had been stabbed in the back; that employees responsible for it were cowards and should have at least given him some warning that they were going to try to get the Guild in (R. 71; Tr. 471-72).

Approximately one week later, McDonnell and Johnson had another conversation regarding the Guild (R. 71; Tr. 473). This conversation took place after working hours in a lounge known as the Lama Room located near the Company's building (*ibid.*). McDonnell told Johnson that she was trying to be neutral but that she would be tempted to vote for the Guild simply to protect employees Lorraine Geittmann, Gary Gillis, and Robert Jones who were known to be Guild leaders (R. 71; Tr. 473-474). Johnson replied that if the Guild got in things would be tough on them (*ibid.*) He continued, "you know how Lori [Geittmann] is late all the time (R. 71; Tr. 475). We just change her hours, and I will have her come in at 5:00 in the morning, and you know how long it would take before Lori is being late. We could dismiss her after a week.' As to Robert Jones, he stated, "You know what an old maid he is about his routines and his schedules all we have to do is put him on a split shift, and he couldn't take that very long" (*ibid.*). On this occasion or shortly thereafter McDonnell asked Johnson how

he could "get" everyone since there were so many employees, and not all were outspoken (R. 71; Tr. 475-476). Johnson replied, "Now, Patty, we have ways; we have ways" (R. 71, Tr. 476).

In a later conversation in the Lama Room, Johnson told McDonnell that she would have to have faith in Curry's statement that the salary inequities at the Company would be corrected (R. 71; Tr. 477). Johnson said he couldn't tell her what her salary would be because he could go to prison if he did, but he promised to write it down on a slip of paper and give it to her the next day (ibid.).

In the middle of May, Johnson also told employee Eugene Hall that he was going to show him a slip of paper some time before the election indicating what his salary would be if the Guild were voted out (R. 71; Tr. 315-316).[6] In early June, Johnson asked Hall to do him a personal favor and not attend the Guild meeting that night. Hall stated that he would not go, and he did not. (R. 72; Tr. 317-328, 346).

2. Robert L. Curry, publisher, Charles Wahlheim, production manager and consultant to publisher, and Robert Paffin[7]

In mid-May, Curray asked McDonnell if she had any grievances or was unhappy about anything (R. 72;

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[6] During the eampaign, Johnson prepared for publisher Curry and other supervisors a list of employees with his evaluation of their stand on the Guild. As to Hall, he reported, "Sees dollar signs, thinks he's better and worth more than he is. Is very impressionable. Listens to me a lot, and a last minute promise of more money from me would weigh heavily on his decision .... He is the kind you worry about selling the day of the election" (R. 71; G.C. Exh. 18).

[7] Paffin is employed by the Company's parent corporation and is admittedly an agent of the Company (R. 72; Tr. 833-835).

Tr. 490-92). She replied affirmatively, mentioning that the woman's editor for another newspaper in the area was making $25 a week more than she even though McDonnell had two employees under her and the other woman had none (R. 72; Tr. 492-93). Curry answered that he had been so busy with the construction of the new building that he had not been aware of how much the salaries were lagging and he assured her that the inequities would be taken care of. He also said that if she had not made up her mind as to how she would vote, that he hoped that she would listen to his side of the story (*ibid.*). About June 21, Curry called McDonnell into his office and told her that she would get a raise of $15 a week on July 1, and that "after this [union] thing is settled" her salary would be comparable to others in the area (R. 72-73; Tr. 494).

In mid-May, during a conversation in which Hall consulted Curry about co-signing a bank note for him, Curry asked Hall how he stood "in this Guild thing" (R. 73; Tr. 320). When Hall replied that he was 100 percent with the Company, Curry complimented him and went on to say that he would know how people voted in the election and that promotions would go to those who voted against the Guild (R. 73; Tr. 321). Curry then agreed to sign for the loan and told Hall that he had a tremendous future with the Company (R. 73; Tr. 322). He then told Hall that he was determined to defeat the Guild and that he would appreciate anything Hall might do to help. In an effort to comply with this request, Hall, a few days later, supplied Curry with a list of employees and how he thought they would vote (ibid.). On July 20, the day of the election, Curry approached Hall and said that he understood that Guild representative Schrader was

at his home the night before and that Hall had called Schrader the day before (R. 73; Tr. 323). Curry said that Johnson and Moon were worried that Hall was going to vote against the Company but that he felt sure that Hall was merely stringing along with the Guild to supply Curry with further information (R. 73; Tr. 323-324). Although Hall replied to Curry that he was correct, he testified at the hearing that he was not, in fact, stringing the Guild along (ibid.).

Curry held staff meetings with employees in the editorial department on June 10 and 22 and July 14 and 16, to discuss the Guild (R. 73). He told them that he was very shocked to be notified that his employees were seeking Guild representation; that he thought they were a family group and that his door had always been open to anyone who had any complaints. He said that he had become aware of inequities and that they would be rectified, but he could not give specific details because he did not want "to end up in jail." He stated that he, Managing Editor Moon and Executive Editor Samuel Stewart had gone over the specific things that would be done to eliminate the inequities (R. 73; Tr. 248-250, 391-394, 397). He told them that there would be no firings because of the Guild (R. 73; Tr. 520).

At the June 10 meeting Charles Wahlheim, production manager and consultant to the publisher[8] stated that a union contract would require strict application

[8] On July 13, Wahlheim's position was changed from production manager to consultant to the publisher in labor relations and production matters. In both positions he negotiated and administered contracts with labor unions representing respondent's employees. The Company has contracts with the International Typographer's Union, the International Stereotyper's Union and with the International Pressmen's Union (R. 73; Tr. 1139-1140).

of rules and regulations while absence of a contract would permit more laxity (R. 73-74; Tr. 394-395). As an example, he told of a senior production employee who had an accident on the job and could not work for a considerable period of time. He said that the Company did not pay sick leave or disability because the union contract did not require it and the Company was afraid of establishing a precedent. (R. 74; Tr. 1140-41.) Amplifying Walheim's remarks, Curry then stated that in the editorial department, if an employee came to work drunk, the company probably would give him a break but that election of the Guild would cause management to be on one side and the employees on the other and would put an end to the family feeling that had existed. Thus, he continued, if they were under a Guild contract and an employee were tardy three times, the Company would have to fire him, because if it did not, it would be setting a precedent and would not thereafter be able to fire anyone for being tardy (R. 74; Tr. 403). He also warned that it might take six months to negotiate a contract (R. 8; Tr. 396).

In the latter part of June, Curry took Peterson to lunch and while there he told him that the Guild was for people who needed a crutch and that he did not understand why a person with Peterson's background would want to join (R. 74; Tr. 594-96). He also said that newspaper companies check with one another concerning applicants: "We also check whether you had any Guild leanings, and a lot of publishers do not like to hire people that had Guild leanings, you know, and this may go bad with you" (R. 75; Tr. 597-98).

About two weeks before the election, Curry told employee Inez Staff that he was very disturbed by "all this Guild fuss" and that he realized that it had a very disrupting influence on the employees: that he realized there were inequities but that he meant to see that they were corrected (R. 75; Tr. 628). He stated that he hated to see the Guild get in because it would destroy the family relationship in the editorial department. (R. 75; Tr. 629.) He told Staff, "Well, you know, we publishers have our organization, too, and if any of those young fellows try to get a job and he has been active in trying to get the Guild in here, we publishers have our own ways of letting each other know that he just wouldn't be a desirable fellow to hire" (*ibid.*).

In mid-June, Curry called employee Gillis into his office. (R. 75; Tr. 84, 87.) He stated he did not question Gillis' part in the Guild, but that the Guild is an irresponsible union and he would show him proof as to why he should change his mind (R. 75; Tr. 84, 87). He told him that raises would be given as part of their salary review whether or not the Guild represented the employees and that after the election there would probably be other raises (*ibid.*). Curry promised to take care of certain inequities that had been brought to his attention. (R. 75; Tr. 87.)

On June 28, two weeks before the election, 23 out of the 25 employees in the unit received wage increases (R. 84; G.C. Exh. 25).

On about July 13, Robert Paffin told McDonnell that he had worked many years on the side of unions in New York and had worked many years on management's side and that if the Guild got in, he would

participate in contract negotiations, and stated, "I know every trick in the book, and we will hold this up for one year, until another election is due" (R. 75; Tr. 499-500).

3. John C. Moon, managing editor

In a telephone conversation with employee Gillis on the evening of May 31, Moon said that if the Guild won the election it would have rules that the Company would have to abide by; one was that if a person is tardy three times, the Company would have to fire him (R. 77; Tr. 76-78). He mentioned that employee Geittman had been tardy on many occasions (R. 77; Tr. 78). He stated that the Company has a lot of heart and the Guild would take this away (R. 77; Tr. 79).

In a conversation in mid-June, Moon told McDonnell that since the Guild agitation had started, they were going to have to make all the salaries at respondent comparable to other newspapers of the same size, and therefore he would be paying the women's editor $165 or $170 a week (*ibid.*).[9] Then he stated, "Therefore, Pat, you make one slip-up, and you will be out, because I can hire anyone I want to at that kind of money" (R. 78; Tr. 485).

A week or two before the election of July 20, Moon told McDonnell that there were five or six employees, including her, who were fence sitters (R. 78; Tr. 485-486). He stated he could not understand why they did not stand up and say whether they were for or against the Guild, or how they were going to vote

[9] McDonnell was then earning $120 per week.

(R. 78; Tr. 487). Moon brought the matter up on several occasions (*ibid.*).

On the day of the election Moon told Hall that if the Guild won the election, Hall, Randy Gray and Lori Geittmann would be fired as a result of a more stringent application of work rules (R. 78; Tr. 332).

About three weeks before the election, Moon asked employee Peterson, "What is this I heard about you being pro-Guild"? (R. 78; Tr. 589-590). Peterson asked who had told him this and Moon replied that a number of employees were compiling lists of those for and against the Guild and that everyone who had checked in with him had reported that Peterson was pro-Guild (R. 78; Tr. 591, 598, 1063). He asked Peterson, "How come you have not approached me on this Guild thing? You are the quietest fellow in the house" (R. 78; Tr. 1064). They then discussed Peterson's goals and his future (R. 78; Tr. 591-593). Moon told him that newspapers keep in contact with each other regarding job applicants and if he wanted to go to another paper for a job, the other paper would probably want to know his background and if they found out about his Guild leanings, they might not want to hire him. (R. 78-79; Tr. 591-592).

In mid-June, Moon and several employees discussed the Guild during a coffee break. (R. 77; Tr. 79-81). Moon suggested that they could form their own union and not have to pay dues, and he recommended use of a suggestion box for employee complaints or suggestions; he stated that since this would solve many of their problems, they would not need the Guild. (*ibid.*). He told them that their salaries would be reviewed

in June and that they were all going to get raises and that after the Guild was defeated they would continue to receive raises (R. 77; Tr. 82).

In early May 1965, Moon told employee McDonnell that employee Erickson had a fine career ahead of him and that it would be too bad if he got mixed up with the Guild because anyone who has been a Guild agitator or a Guild supporter would never get into a managerial position, and that this was the case at the Company's newspaper in San Diego, California, where the Guild represents the employees (R. 77-78; Tr. 480-481).

Later that month, Moon called McDonnell into his office and reprimanded her because she reported for work late that morning. He said that if the Guild and the federal government were not breathing down his back, he would fire her (R. 78; Tr. 482-485). He then handed her a letter about her tardiness that morning, told her this was evidence that she had been late, and stated that if the Guild got in, "three times late, Pat McDonnell, and you will be out on the streets" (R. 78; Tr. 484). McDonnell testified that she has frequently been late to work but that she had never missed a deadline (*ibid.*).

C. The Election

The election, held on July 20, resulted in a tie vote (R. 70; G.C. Exh. 1(p)). Shortly thereafter, the Guild filed timely objections to the conduct affecting the results of the election (R. 68; G.C. Exh. 1(h)). At the same time the Guild filed the instant charges alleging violation of Section 8(a)(1) and (5) (R. 1; G.C. Exh. 1(j)). The two cases were consolidated herein (R. 68; G.C. Exh. 1(r)).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that the Company violated Section 8(a)(1) of the Act by interrogating employees about their union activities, threatening them with discharge, blacklisting and lack of opportunity for promotion to managerial positions because of those activities, promising wage increases and other benefits, and granting wage increases to discourage union activities, soliciting an employee not to attend a union meeting, giving employees the impression of surveillance of their union activities and threatening employees with a stringent and heartless application of work rules if the Guild won the election. (R. 85). The Board also found that the Company violated Section 8(a)(5) of the Act by refusing, in bad faith, to recognize and bargain collectively with the Guild, by unilaterally granting wage increases to employees (R. 85), and by threatening to delay bargaining after the election (R. 76).

The Board ordered the Company to cease and desist from the unfair labor practices found and from interfering in any other manner with the employees' rights under the Act. Affirmatively, the Company was ordered to bargain upon request by the Guild and to post the appropriate notices (R. 86).[9a]

[9a] In the representation case, consolidated herein, the Board found merit in the Guild's objections to the election and set it aside.

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDING THAT THE COMPANY INTERFERED WITH, RESTRAINED AND COERCED ITS EMPLOYEES IN THE EXERCISE OF THEIR STATUTORY RIGHTS, IN VIOLATION OF SECTION 8(a)(1) OF THE ACT

The record reveals that upon learning of the Guild's majority status, the Company initiated a comprehensive campaign of interrogation, threats of reprisal, promises and granting of benefits, all designed to intimidate and influence the employees to renounce their association with the Guild. Thus, news editor Johnson,[10] managing editor Moon and publisher Curry questioned several employees about whether they were for or against the Guild. Curry and Moon told employees that Guild supporters would not be promoted to managerial positions and several times threatened that pro-Guild employees would never get another job in the newspaper industry because the "news-

[10] There is no merit to respondent's contention that Johnson is not a supervisor. This issue was fully litigated in the representation hearing and the Regional Director found that Johnson was a supervisor since he "possesses and exercises the authority to assign stories to reporters, review their work, request the rewriting of stories, assign overtime, grant time off and discipline employees. He coordinates the operations of about 5 other staff members of the news department. He also regularly fills in for Managing Editor Moon, an admitted supervisor" (G.C. Exh. 1). At the unfair labor practice hearing respondent was given an opportunity to introduce any new or previously unavailable evidence on this issue but failed to do so. Under these circumstances the Board did not abuse its discretion by adopting the Regional Director's decision. *Amalgamated Clothing Workers of America (Sagamore Shirt Co.)* v. *N.L.R.B.*, 365 F. 2d 898, 905 (C.A. D.C.).

In any event respondent, in this case, is responsible for Johnson's conduct whether he was a supervisor or not, for the record is clear that "the other employees had justifiable cause for believing that [he] was acting for and on behalf of management when [he] did the acts in question." *Betts Baking Co. Inc.* v. *N.L.R.B.*, 380 F. 2d 199, 202 (C.A. 10).

papers keep in contact with each other regarding job applicants" and "a lot of publishers do not like to hire people that had Guild leanings" (Tr. 591-92, 597-98). Similarly, Johnson told an employee that the Company would find out how the employees voted and that, if the Guild got in, things would be tough on those who voted for it.

Moon and Curry also gave employees the impression that their union activities were under the Company's surveillance. Thus, about three weeks before the election Moon approached employee Peterson and said that he had heard that Peterson was for the Guild. When Peterson denied it and asked who had said so, Moon replied that a number of employees were compiling lists of those for the Guild and those against it and that everyone had reported that Peterson was pro-Guild. Moon then proceeded to coercively question and threaten Peterson about his union sympathies. Then, on election day, Curry approached employee Hall and said that he understood that Guild representative Schrader was at his house the night before and that Hall had called Schrader the day before. He also said that if the union won, Hall, Gray and Geittmann would be fired.

Furthermore, as shown in the Statement, the Company repeatedly promised salary increases to its employees during the election campaign, informing some that "inequities" would be corrected after the Guild matter was settled, and making more specific promises to McDonnell and Hall.[11]

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[11] Shortly after Johnson promised a wage raise to Hall on the condition that the Guild lose the election, he approached Hall and asked him, as a personal favor, not to attend a Guild meeting that evening. The Board, in agreement with the Trial Examiner, correctly found that this was also a violation of Section 8(a)(1). *N.L.R.B.* v. *Kit Mfg. Co.*, 292 F. 2d 686, 690 (C.A. 9).

That the foregoing conduct by the Company constituted unlawful interference, restraint and coercion within the meaning of Section 8(a)(1) of the Act is clear beyond doubt.[12] Before the Board the Company did not argue that this conduct does not violate Section 8(a)(1). Rather, the Company's sole argument was that the Trial Examiner should have credited its witnesses and not the employees.[13] This argument, made in the face of the Trial Examiner's careful and detailed credibility resolutions, (R. 69, 72, 76) is clearly without merit. In rejecting this very argument in similar circumstances, this Court recently said:

> We must give great weight to the credibility findings of the Trial Examiner. *N.L.R.B.* v. *Local*

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[12] Interrogating employees about their union sympathies: *N.L.R.B.* v. *Luisi Truck Lines,* 66 LRRM 2461, 2462 (C.A. 9), decided October 27, 1967; *N.L.R.B.* v. *Security Plating Co.*, 356 F. 2d 725, 728 (C.A. 9); *N.L.R.B.* v. *Ace Comb Co.,* 342 F. 2d 841, 843-44 (C.A. 9). Threatening reprisals for union activities: *N.L.R.B.* v. *Ace Comb Co., supra; N.L.R.B.* v. *Sebastopol Apple Growers Union,* 269 F. 2d 705, 708 (C.A. 9); *N.L.R.B.* v. *Ambrose Distributing Co.,* 358 F. 2d 319, 320-31 (C.A. 9), cert. denied, 385 U.S. 838; *N.L.R.B.* v. *Kit Mfg. Co.,* 292 F. 2d 680, 690 (C.A. 9). Creating the impression of surveillance: *N.L.R.B.* v. *Security Plating Co., supra;* Promising benefits during election campaign: *N.L.R.B.* v. *Security Plating Co., supra; N.L.R.B.* v. *Kit Mfg. Co.,* 292 F. 2d 686, 690 (C.A. 9).

[13] The Company did make an alternative argument with respect to one of the instances of 8(a)(1) conduct. It argued that Johnson's statement to McDonnell that the Company would find out who voted for the Guild and make things tough on them was not coercive because it came up in a casual conversation at a bar after working hours. There is no merit to this contention. The statement is coercive on its face and its impact is not lessened because it was made in a bar. Moreover, the bar in question, the "Lama Room", was the location of most of the pre-election campaigning by both the Guild and respondent. And Johnson had, in prior conversations with McDonnell in the Lama Room, made coercive and threatening statements in connection with the Guild.

> *776, IATSE (Film Editors),* 303 F. 2d 513, 518 (9th Cir. 1962), *cert. denied,* 371 U.S. 826 (1962). "This court does not sit to parrot the Board's conclusions, but neither does it sit to judge the credibility of witnesses . . . or dispute the Board's choice between two fairly conflicting views although this court might justifiably make a different choice were the matter before it de novo." *N.L.R.B.* v. *Stanislaus Implement & Hardware Co.,* 226 F. 2d 377, 381 (9th Cir. 1955). This is not to say that we are irrevocably bound by the credibility determinations of the Trial Examiner, but rather that his findings shouldn't be disturbed unless a clear preponderance of all of the relevant evidence convinces that they are incorrect. We have examined the record and have not found ample reason for reversing the credibility finding. We therefore affirm the Board's findings of a violation of section 8(a)(1). [footnote omitted]

N.L.R.B. v. *Luisi Truck Lines, supra,* 66 LRRM at 2462-2463.

There is also substantial evidence to support the Board's finding that remarks by four management officials that working rules would be heartlessly and vindictively administered constituted a violation of Section 8(a)(1) of the Act. The employer did not merely advise his employees that he would require strict adherence to work rules. The remarks of Curry and Walheim (*supra,* pp. 9-10), when considered with those of Johnson and Moon, make it clear that the employer was informing the employees that the rules would be manipulated so that pro-Guild employees would violate them and be discharged. Thus Johnson told McDonnell that if the Guild got in things would be tough on Guild leaders Geittman, Gillis and Jones.

Johnson explained ". . . you know how Lori [Geittman] is late all the time. We just change her hours, and you know how long it would take before Lori is being late. We could dismiss her after a week." As to Robert Jones, he stated, "you know what an old maid he is about his routines and his schedules; all we have to do is put him on a split shift, and he couldn't take that very long." (R. 71; Tr. 474-475.) In a written report submitted by Johnson to Curry giving his appraisal of employees' feelings on the Guild, he suggested that employee Randy Gray might be convinced to vote for the Company with the selling point that "Guild rules will cost you your jobs" (G. C. Exh. 18). Managing Editor Moon told McDonnell that the Guild would take the heart out of the employer-employee relationship and that if she was late 3 times after the Guild got in she would be fired. Moon told employee Hall that he, Gray and Geittmann would be fired after the Guild got in because work rules would be more stringently applied. In short, the Company's warnings to the employees that work rules would be used to discharge pro-Guild employees violate Section 8(a)(1).[14]

It is also settled that conferring economic benefits in order to inhibit employee's freedom of choice violates Section 8(a)(1). *N.L.R.B.* v. *Exchange Parts Co.,* 375 U.S. 405. Here 23 of the 25 employees in the unit received salary increases of $5 to $15 per week shortly before the election The Board's con-

[14] *N.L.R.B.* v. *Sebastopol Apple Growers Union,* 269 F. 2d 705, 708 (C.A. 9): "If you girls think I am tough now, wait; if the Union gets in, I'll show you how tough I can be," found violative of 8(a)(1). Accord: *Edward Fields, Inc.* v. *N.L.R.B.,* 325 F. 2d 754, 670 (C.A. 2).

clusion that the purpose of the increases was to influence the employees is plainly warranted. Thus, it is clear from both Company and Union witnesses that wages were the primary concern of the employees, and the employer knew it; the memorandum from Johnson to Curry (see p. 7, n. 6 *supra*) which discussed the union sentiments of the employees suggested that for several employees a raise in pay would sway their sentiments away from the Guild.[15] And, as shown, *supra* pp. 7, 8, 9, 11, 12, 13-14, many promises of wage raises had been made to the employees during the election campaign. The company's true motive is most clearly revealed by company agent Paffin's statement to McDonnell that "the main issue in this Guild thing has been money, and now that is settled, or soon will be, there is really not much sense in bringing it in is there" (Tr. 533).

In sum, the Board properly concluded that the Company granted these wage increases "for the purpose of interfering with, restraining and coercing employees in the pending representation election." (R. 18). *J. C. Penny Co. Inc.* v. *N.L.R.B.,* August 29, 1967, 66 LRRM 2069, 2073 (C.A. 10); *American Sanitary Products Co.* v. *N.L.R.B.,* 382 F. 2d 53 (C.A. 10); *Betts Baking Co.* v. *N.L.R.B.,* 380 F. 2d 199, 203 (C.A. 10); *Crown Tar and Chemical Works, Inc.* v. *N.L.R.B.,* 365 F. 2d

[15] Respondent contends that this document should not have been admitted into evidence because it was allegedly stolen from a supervisor's desk. Respondent relies on the dissenting opinion in *Burdeau* v. *McDowell,* 256 U.S. 465. But the decision in that case holds that allegedly stolen documents are admissible unless an agent of the government was a party to the wrongful seizure. The Board, of course, follows this rule in its proceedings. *General Engineering, Inc.,* 123 NLRB 586; *Air Line Pilots Ass'n,* 97 NLRB 929; *Andrew Jergens Co. of Calif.,* 27 NLRB 521. In any event, the information in the memorandum is merely cumulative.

588, 590 (C.A. 10); *United Automobile Workers (Preston Products Co., Inc.)* v. *N.L.R.B.*, — F. 2d — (C.A.D.C. No. 20, 137, decided November 14, 1967), Slip opinion pp. 7, 8.

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION

Section 8(a)(5) of the Act requires an employer "to bargain collectively with the representative of his employees, subject to the provisions of Section 9(a)." Section 9(a) provides that "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining." Although Section 9(c)(1) provides the machinery by which the selection of a representative may be determined in a Board-conducted election, it has long been settled that an election is not the only means by which representative status may be established. See *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72, and cases cited at n. 8 therein. It is equally well settled that where authorization cards have been signed by a majority of the unit employees, the employer violates Section 8(a)(5) of the Act if he refuses to recognize and bargain with the union, unless such refusal is motivated by a good-faith doubt of the union's majority status. We show below that a majority of the employees in an appropriate unit validly designated the Union as their bargaining representative and that the Company refused recognition, not because of good-faith doubt of the Union's majority status, but to gain

time in which to undermine that status. *N.L.R.B.* v. *Security Plating Co., Inc.*, 356 F. 2d 725, 727 (C.A. 9); *N.L.R.B.* v. *Hyde*, 339 F. 2d 568, 570 (C.A. 9); *Sakrete of Northern California, Inc.* v. *N.L.R.B.*, 332 F. 2d 902, 908-909 (C.A. 9), cert. denied, 379 U.S. 961, rehearing denied, 380 U.S. 926; *Colson Corp.* v. *N.L.R.B.*, 347 F. 2d 128 (C.A. 8), cert. denied, 382 U.S. 904; *N.L.R.B.* v. *Economy Food Center, Inc.*, 333 F. 2d 468, 471-72 (C.A. 7); *Florence Printing Co.* v. *N.L.R.B.*, 333 F. 2d 289, 291-92 (C.A. 4); *Irving Air Chute Co.* v. *N.L.R.B.*, 350 F.2d 176, 182 (C.A. 2).

A. The Guild Had Majority Status in An Appropriate Unit

1. The Trial Examiner correctly precluded the Company from relitigating in the unfair labor practice proceeding the supervisory status of certain employees

On April 26, the Guild filed a representation petition, seeking an election in a unit of "all regular editorial department employees" (G.C. Exh. 1(a)). The Company contended, *inter alia,* that six employees[16] were not supervisors and should, therefore, be included in the unit. A three-day hearing was held to determine the status of the employees. The Regional Director then issued a Decision and Direction of Election in which he held that three[17] of the six employees were supervisors and, therefore, not included in the unit. The Company did not request the Board to review this

[16] Sports Editor Richard White, Women's Editor Patricia McDonnell, Photographer Robert Moore, City Editor Jay Berman, News Editor Kenneth Johnson and Assistant News Editor Gary Palmer.

[17] Berman, Johnson and Palmer.

determination [18] but, instead, executed a waiver of its right to appeal (G.C. Exh. 1(b)). Accordingly, pursuant to the terms of the Regional Director's decision, employees Berman, Johnson and Palmer did not vote in the ensuing election.[19]

At the hearing before the Trial Examiner, the Company sought to litigate again the status of employees Berman, Johnson and Palmer. The Trial Examiner, relying upon Board Rule 102.67(f), rejected this attempt.[20] The Company's contention that it should have been allowed to relitigate the status of those employees is based upon its argument that the present unfair labor practice proceeding is not "related" to the representation proceeding within the meaning of Rule 102.67(f). As we show below, this contention is without merit.

It is well settled that determinations made in a representation case are not directly reviewable in the courts.[21] However, where the Board orders an employer to bargain with a union, and its order "is

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[18] Section 102.67(b) of the Board's Rules and Regulations, 29 CFR 102.67, provides for Board review of the Regional Director's Decision.

[19] As noted *supra*, p. 14, the election resulted in a tie vote, the Union filed objections to the Company's conduct affecting the result of the election, and that case was consolidated with the instant unfair labor practice case.

[20] Board Rule 102.67(f), 29 CFR 102.67(f) provides that "The parties may at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding . . . ."

[21] See, e.g., *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476; *A.F.L.* v. *N.L.R.B.*, 308 U.S. 401.

based in whole or in part" (Section 9(d))[22] upon determinations made in the representation proceeding, an employer may obtain judicial review of the entire representation proceeding by refusing to bargain with the union. Because in such cases, the representation case is a part of the record, and therefore reviewable by the Court (Section 9(d)), one opportunity to litigate an issue is considered sufficient and there is no right to litigate again, in the unfair labor practice hearing, what has already been litigated in the representation case.[23] The Company acknowledges this analysis, but would limit its application to the situation where the Union *wins* the election, is certified, and the employer refuses to bargain to test the certification. There is, we submit, no reason in law or policy for such a limitation.

Section 9(d) makes no distinction based upon whether a union wins or loses the election.[24] Thus,

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[22] Section 9(d) of the Act provides:

> Whenever an order of the Board made pursuant to Section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

[23] *N.L.R.B. v. International Union of Operating Engineers Local 66, etc.*, 357 F. 2d 841,846 n. 10 (C.A. 3) and cases cited therein.

[24] In addition to the reasons set forth, *infra*, pp. 25-26, we note, as the Board found, that the Union's election loss was attributable to the employer's unfair labor practices. There is surely no reason to allow the employer to relitigate an issue because he has caused the Union to lose the election, when it is clear he would not have been permitted to do so had he obeyed the law.

where, as here, the Union loses an invalid election and the Board then issues a bargaining order, the employer may still obtain court review of the determinations made in the representation case insofar as the Board's order is based upon those determinations.[25] Here the Board's order plainly rests, at least in part, upon the Regional Director's determination that three employees were supervisors, and therefore not eligible for inclusion in the unit. In seeking to relitigate the status of these employees, the Company did not allege that it had new or previously unavailable evidence to offer. It sought merely to introduce the same evidence, in order to litigate the same issue for the same purpose—to contest again the proper composition of the bargaining unit. However, since the issue has already been litigated in the representation case, and since the Board's bargaining order is based in part upon the resolution of this issue, making that determination reviewable in the court of appeals (Section 9(d)), there is no reason to allow the same issue to be litigated again, on the same evidence, for the same purpose.[26]

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[25] The Board has certified the representation case record to this Court for its review herein. See, in this regard, *N.L.R.B.* v. *Southbridge Sheet Metal Works, Inc.*, 380 F. 2d 851, 853-54 (C.A. 1).

[26] *Amalgamated Clothing Workers of America v. N.L.R.B. (Saga-more Shirt Co.)*, 365 F. 2d 898 (C.A.D.C.) is distinguishable. There, the Court held that supervisory status of certain employees could be relitigated in a subsequent unfair labor practice case because the status of the employees was important for a reason quite apart from any issue involved in the refusal to bargain charge. In such a case, it could be said that a party is not on notice of, and should not be required to anticipate, any *additional* consequences of losing an issue which he has intended to litigate only for election purposes. Thus, where, ". . . the part of the charge involved in the relitigation issue is not refusal to bargain, but rather, interference with rights of organization, the proceedings are not so

2. The Company's failure to file exceptions to the regional director's decision precludes it from attacking that decision in this court

As shown, *supra,* pp. 23-24, the Company did not file exceptions to the Regional Director's decision disposing of the supervisory status of certain individuals. Instead, the Company filed a waiver of its right to have the Board review the Director's decision, and the election was held pursuant to the terms of that decision. We submit, for the following reasons, that the Company's failure to seek review by the Board of the Regional Director's decision, precludes it from obtaining judicial review of that decision.

Section 10(e) of the Act provides that "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless failure or neglect to urge such objection shall be excused because of extraordinary circumstances." This section consistently has been held to apply where an issue was litigated before the Trial Examiner in an unfair labor practice proceeding, but not renewed before the Board by means of timely exceptions to the Trial Examiner's Decision. *N.L.R.B.* v. *International Union of Operating Engineers Local 66, etc.* 357 F. 2d 841, 846 n. 10 (C.A. 3); *N.L.R.B.* v. *Guistina Bros. Lumber Co.,* 253 F. 2d 371, 374 (C.A. 9). These holdings go beyond a literal reading of Section 10(e), since the Trial Examiner might well be considered an "agent" of the Board. However, it was recognized that if the Board could properly require

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related as to foreclose presentation to the Board of the underlying issue." 365 F. 2d at 905. On the other hand, "the rule [against relitigation] is clear enough where the Company seeks to justify an alleged refusal to bargain on the ground that the earlier unit determination is incorrect." 365 F. 2d at 904.

timely exceptions to the Trial Examiner's Decision as a precondition to Board consideration of contentions raised before the Trial Examiner, then Section 10(e) of the Act must be interpreted to preclude judicial consideration of findings to which no exceptions have been filed. A contrary interpretation of Section 10(e) would "virtually destroy" the Board's procedural rule, for the "Board could hardly continue to consider only those issues in the Intermediate Report [now called "Trial Examiner's Decision"] to which formal exception is taken if the Courts are going to review every thing raised before the Hearing Examiner." *Kovach* v. *N.L.R.B.,* 229 F. 2d 138, 143 (C.A. 7).

Preclusion of judicial review of the finding made by the Regional Director here involves but another application of this principle. The Company did not seek review of the Regional Director's decision as the Board's rules provided it might. Since the Company elected not to take issue with the Director's determinations an election was held in accordance with those determinations.[27] In these circumstances, we submit that the Company should be deemed to have waived any attack on the Regional Director's determinations and this Court may appropriately decline to pass upon them. *N.L.R.B.* v. *Delsea Iron Works, Inc.,* 334 F. 2d 67, 71 (C.A. 3).[28]

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[27] If the Company had not filed a waiver of its right to review, the Regional Director would not have conducted an election until the Company's objections were reviewed by the Board. See Rule 102.67 (b).

[28] Although the Third Circuit in *N.R.L.B.* v. *Capital Bakers, Inc.,* 351 F. 2d 45, 48, rejected the Board's contention that failure to follow prescribed procedures to overturn the Regional Director's unit determination was a waiver of the exceptions thereto, the court found that the circumstances there were "special"—i.e.,

Nor may the Company properly contend that it fulfilled its Section 10(e) obligation by attempting to establish the alleged error in the Regional Director's decision in the complaint proceeding. As shown, *supra*, pp. 24-26, with respect to the status of the employees, the representation and unfair labor practice proceedings are one. Accordingly, asserted error at any stage of the proceedings must be preserved in compliance with prescribed procedural requirements. These requirements serve to insure that matters involved in representation proceedings are brought to the Board's attention at a time when they may be resolved with the least delay and prejudice to all concerned. This, in turn, aids the quick and final resolution of representation issues and protects the employees' right to choose or reject a bargaining representative in an expeditious fashion. Here, the Company was fully apprised of its right to request review of the Regional Director's decision. Had it done so, the election would not have been held until the Board ruled on the Company's objections, and if it agreed with those contentions the election would have been held in the unit considered appropriate by the employer. There is surely no reason why that representation issue should not have been finally settled in the representation case, rather than in the complaint case, long after the election had been held. Nor is there a claim that extraordinary circumstances excused the failure to file exceptions at the

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exceptions to the Board would have been futile since the Board's unit position had been established in prior litigation, the intervening Supreme Court decision in *N.L.R.B.* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, had cast doubt on the validity of the Board's position, and the respondent had maintained "his position from the inception of the proceedings, and the Board had been adequately apprised of his intention to rely on this." Cf. *N.L.R.B.* v. *Sun Drug Co.*, 359 F. 2d 408 (C.A. 3).

appropriate time as required by the Board's rules. Accordingly Section 10(e) of the Act precludes judicial review of the Company's defense.

Furthermore, the Company's failure to exhaust an available administrative remedy precludes review here irrespective of the application of Section 10(e) of the Act. *N.L.R.B.* v. *Rexall Chemical Co.,* 370 F. 2d 363, 365-366 (C.A. 1). In *Rexall,* as in this case, the employer failed to take exception to the Regional Director's report, attempted, unsuccessfully, to relitigate the issue in the unfair labor practice proceeding and then sought judicial review, claiming error by the Regional Director. The Court precluded review, applying the doctrine of exhaustion of administrative remedies, ". . . a long and well established general rule of law resting upon considerations of fairness and orderly procedure." *Rexall, supra,* 370 F. 2d at 366. Quoting from the Supreme Court's decision in *United States* v. *Tucker Truck Lines,* 344 U.S. 33, 36-37, the Court pointed out that:

> Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that Courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under the practice.

As we have shown, there is no reason why the Company could not have filed timely objections to the Regional Director's decision. Since it chose not to do so, it may not press its claim in this Court.

3. The authorization cards are valid

It is well settled that an employee's execution of a clear and unambiguous card, such as the one in the present case,[29] constitutes an effective designation of

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[29] The cards read as follows:

AMERICAN NEWSPAPER GUILD (AFL-CIO, CLC)

MEMBERSHIP APPLICATION

I designate the American Newspaper Guild and its Local my agent in collective bargaining, and authorize the American Newspaper Guild and its Local to represent me before any Board, Court, Committee or other Tribunal in any matter involving collective bargaining, and I authorize the American Newspaper Guild and its Local to represent me in adjusting any grievances I may have in connection with my employment. I pledge myself to abide by the constitution of the American Newspaper Guild and the Bylaws of the Local Guild.

Name .....
(please print) (Date of birth) (Home phone)
Home Address .....
.....
(Employed by) (Date of hire) (Present salary)
.....
(Department in which employed) (Job title)
Application received by ..... Local Guild .....
Herewith $..... initiation fee and $..... for ..... month's dues
Date ..... Signature .....
(The ANG constitution requires that, when turned into the local Guild, this card be accompanied by an initiation fee and one month's dues; where a dues deduction agreement is in effect, a signed checkoff card may be accepted instead of the month's dues.)

[OVER]

Have you previously been a member of the American Newspaper Guild, any of its locals, or any other union? If so, please state when and where:

Please list all previous experience in newspaper or comparable work, giving city, company, job title and dates:

Please check those Guild activities in which you would like most to participate:

☐ Contract negotiations
☐ Contract enforcement
☐ Organizing
☐ Budget, dues collection
☐ Inter-union relations
☐ Education, publications
☐ Human rights
☐ Legislation
☐ Social affairs awards

the union as his bargaining agent, unless the employer can make a clear showing that the employee signed the card because of a material or gross misrepresentation of its purpose. *United Automobile Workers (Preston Products Co., Inc.)*, F. 2d (C.A.D.C.), No. 20,137, decided November 14, 1967; *N.L.R.B.* v. *Gotham Shoe Mfg. Co.*, 359 F. 2d 684, 686 (C.A. 2); *N.L.R.B.* v. *Security Plating Co.*, 356 F. 2d 725, 726-727 (C.A. 9); *Happach* v. *N.L.R.B.*, 353 F. 2d 629, 631 (C.A. 7); *N.L.R.B.* v. *C. J. Glasgow Co.*, 356 F. 2d 476, 478 (C.A. 7); *Englewood Lumber Co.*, 130 NLRB 394, 395; *Jas. H. Matthews & Co.* v. *N.L.R.B.*, 354 F. 2d 432, 437-438 (C.A. 8), cert. denied, 384 U.S. 1002. Cf. *N.L.R.B.* v. *Swan Super Cleaner, Inc.*, decided October 25, 1967, 66 LRRM 2385 (C.A. 6). Contra: *N.L.R.B.* v. *S. S. Logan Packing Company*, — F. 2d — (C.A. 4), No. 10,355, decided October 27, 1967. "A morass of hazy individual recollections of attendant circumstances will not suffice." *Amalgamated Clothing Workers of America (Hamburg Shirt Corp.)* v. *N.L.R.B.*, 371 F. 2d 740, 745 (C.A.D.C.). Where, as here, the cards clearly state their purpose, full effect will be given to them, regardless of the subjective state of mind of the signatories, absent proof of fraud or coercion in obtaining the signatures.[30]

Strong reliance on the clear terms of an authorization card is especially appropriate in this case. The employees involved had a college education. As company counsel observed, "the more educated a person,

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[30] "[A]n employee's thoughts (or afterthoughts) as to why he signed a union card and what he thought that card meant, cannot negative the overt action of having signed a card designating the union as bargaining agent." *Joy Silk Mills* v. *N.L.R.B.*, 185 F. 2d 732, 743 (C.A.D.C.), cert. denied, 341 U.S. 941. Accord: *Colson Corp.* v. *N.L.R.B.*, 347 F. 2d 128, 135 (C.A. 8), cert. denied, 382 U.S. 904; *N.L.R.B.* v. *Winn-Dixie Stores, Inc.*, 341 F. 2d 750, 755 (C.A. 6), cert. denied, 382 U.S. 830; *N.L.R.B.* v. *Stow Mfg.*, 217 F. 2d 900, 902 (C.A. 2), cert. denied, 348 U.S. 964; *N.L.R.B.* v. *Greenfield Components Corp.*, 317 F. 2d 85, 89 (C.A. 1).

the less likely they would be induced or coerced" (Tr. 261). As newspaper reporters, they are members of a profession skilled in the use and understanding of language, and in the ability to "ferret out the truth" (Tr. 262). These employees admittedly read and signed the clearly worded authorization cards which were captioned, in capital letters: MEMBERSHIP APPLICATION. On the other hand, the testimony upon which the Company relies to invalidate the cards occurred nine months after they were signed; the employees in question were still employed by the Company; and they were not likely to have forgotten their employer's threats to blacklist Guild supporters, or other threats, promises and inducements designed to force abandonment of the Guild. Appropriate in such circumstances, is the recent observation of the District of Columbia Circuit:

> . . . we have here the classic case of employees testifying under the eye of the company officials about events which occurred almost a year before and prior to the activities which were subsequently found to constitute unfair labor practices. It is certainly conceivable that those same threats and benefits which shook an employee's original support for the union also altered that employee's memory as to events which occurred before the presentation of such threats and benefits.

United Automobile Workers (Preston Products Co., Inc.) v. *N.L.R.B., supra,* Slip opinion p. 10. Accord: *N.L.R.B.* v. *Southbridge Sheet Metal Works*, 380 F. 2d 851, 855 (C.A. 1).[31]

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[31] In the *Preston Products* case, as here, extensive threats were made and almost all of the employees received pay increases during the election campaign. Judge Wright's observation in *Preston* that "Surely the Board might well conclude that in the real world employer blandishments and coercion amounting to unfair labor practices during an election campaign can result in tailored testimony" (*Preston,* supra, at n. 2, p. 11) is equally applicable here.

Here, the Board found that when the Guild demanded recognition it held 14 valid authorization cards, giving it a majority of the 25 employees in the unit. The Company contests six of the cards. As we shall show, the evidence is clearly insufficient to show that the cards were signed because of a material misrepresentation with respect to their purpose.

Floyd Rinehart

Rinehart knew that the Guild could achieve representation without an election. Indeed, his testimony is explicit: ". . . had there been sufficient cards signed to influence Mr. Curry to agree to a contract negotiation with the Guild as a bargaining agent, without an election, then we would not have to go through a campaign. But . . . it was not my thinking . . . that it was ever going to be that easy." (Tr. 715). Thus, Rinehart believed that there would be an election—not because of any misrepresentation made to him—but because the employer would not grant recognition without one. Moreover, Rinehart's activities on behalf of the Union made it plain that in signing the card he "meant to make the Union [his] representative." *N.L.R.B.* v. *Stow Mfg. Co.,* 217 F. 2d 900, 902 (C.A. 2), cert. denied, 348 U.S. 964. See also, *N.L.R.B.* v. *Hyde,* 339 F. 2d 568 (C.A. 9). He made the initial contact with the Guild, and acted "as an unofficial agent of the union in trying to get cards signed for the union . . ." (Tr. 715). Thus, his actions at the time of the events in question were consistent with his testimony that he signed a card because he wanted the Guild to represent him (Tr. 715).

Robert Peterson

Peterson testified that Gillis, in soliciting his card, clearly informed him that, "if we get enough cards signed, we probably won't even have to have an election. Mr. Curry can probably, you know, say okay . . ." (Tr. 605). And when asked by Company counsel, "Didn't [Gillis] say the only purpose in signing the card was to have an election?", Peterson responded, "No. The purpose in signing the card is to be represented by the Guild." The Company's claim of misrepresentation is based on statements by Gillis that Mr. Curry probably would not grant recognition without an election, and that signing the card did not commit one to vote for the union *if* there was an election (Tr. 606, emphasis added). This, of course, is not a misrepresentation, but an accurate reflection of the union's expectations. Gillis' full disclosure with respect to the card's purpose, and the fact that representation could be obtained solely on the basis of authorization cards, completely refutes the Company's claim of misrepresentation.

Randolph Gray

Gray testified that he read the card before signing it, and knew that it could be used to obtain recognition without an election (Tr. 742-743). Although Gillis had, in urging Gray to sign, told him that he was trying to bring about an election, this falls far short of a representation that the card would not be given its stated effect. The mere mention of an election in connection with a solicitation to sign is not sufficient to vitiate the clear and unambiguous designation of a bargaining representative. See, *e.g., Amalgamated Clothing Workers of America (Sagamore Shirt Co.)* v. *N.L.R.B.,* 365 F. 2d 898, (C.A.D.C.); *United Auto-*

mobile Workers (Preston Products Co., Inc.) v. *N.L.R.B., supra; N.L.R.B.* v. *Cumberland Shoe Corp.,* 351 F. 2d 917, 920 (C.A. 6); Cf. *N.L.R.B.* v. *Swan Super Cleaners, supra,* 66 LRRM 2385 (C.A. 6). Gillis did not indicate that there would *necessarily* be a later opportunity to decide whether or not to designate the Union and, as noted, *supra,* Gray knew what he had signed and its effect. His later testimony that he wasn't "convinced" that he wanted the Guild when he signed the card is surely not evidence of a misrepresentation made to him. See n. 30, *supra.* Nor does his affirmative response to a leading question as to whether the sole purpose of the card was stated to be to get an election change the fact that Gray admittedly read the card and knew that it could be used to obtain representation without an election.[32]

Charles Cole

The Board found that the purpose of the card was misrepresented to Cole. However, after considering all the circumstances surrounding his signing, the Board concluded that he was not induced to sign the card because of the misrepresentation but because he

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[32] Affirmative answers to leading questions used by Company counsel, e.g., "Were you told that the only purpose of signing the card was to obtain a Labor Board election?" are entitled to little probative weight. In *N.L.R.B.* v. *Cumberland Shoe Corp.,* 351 F. 2d 917, 919 (C.A. 6) the Court, quoting the Board decision in that case, stated:

> "The record indicates that the testimony * * * [that some signatories were told that the purpose of the cards was to obtain a Board election] consisted of affirmative responses by the signatories to leading questions propounded by Respondent's counsel, upon cross-examination, as to whether they were told that the purpose of the cards was to secure an election. We do not deem such testimony sufficient to controvert the statement of the purpose and effect of such cards contained on the face thereof, nor do we consider it inconsistent with an understanding that the cards served the dual purpose of designating a representative and of securing an election."

wanted the Guild to represent him (R. 83). Thus, Cole, a former member of the Guild, was approached by Gillis who persuaded him of the advantages of the Guild. Cole testified that "[Gillis] made a pretty good argument for the Guild, and when he left I was pretty well sold on what they were trying to do" (Tr. 648). Cole not only filled out and signed the authorization card, but volunteered to participate in Guild activities (G.C. Exh. 12). Then, during the early part of the election campaign Cole actively supported the Guild (Tr. 659). In sum, the Board's conclusion that Cole signed the card because he wanted Guild representation rather than because of the misrepresentation made to him is warranted on this record.

Richard Baylor

Baylor's card was solicited by Rinehart, who told him of the benefits the Guild would bring. Since Baylor was most concerned about wages, Rinehart stressed the differences between the Company's current wages and the Guild's scale. (Tr. 763, 765, 769-770). Baylor then read the card and signed it (Tr. 763). Baylor also testified that Rinehart told him the card would be used to petition for an election but could not say whether Rinehart said that was the only purpose of the card (Tr. 761). Baylor knew that the card could be used to obtain recognition without an election but could not remember if Rinehart told him so at the time he signed. In sum, all that Baylor's testimony establishes is that there exists a "morass of hazy . . . recollections" [33] of the circumstances surrounding the signing of his card. This, we submit, falls far short of the

[33] *Amalgamated Clothing Workers (Hamburg Shirt Co.)* v. *N.L.R.B.*, 371 F. 2d 740, 745 (C.A.D.C.).

clear showing of misrepresentation necessary to invalidate a clear and unambiguous authorization card. See cases cited, *supra,* p. 32.

Donald Erickson

Erickson read the authorization card, filled it out, and signed it. He did so after Gillis approached him, and informed him that some of the employees were trying to get the Guild in; told him something about the Guild, and of the possible benefits that could be achieved by joining. (Tr. 672). Erickson also testified that Gillis told him that "he wanted to get as many cards as he could and this would show the Company that the employees were united, that they wanted better conditions, and the more cards the better . . . and Mr. Curry would know at least a majority or a large number of his employees were interested in bringing about the election or interested in exploring the idea further . . . or interested in having the Guild represent them" (Tr. 679-680). In sum, the evidence fails to show that Erickson executed the authorization card [redacted] because of a misrepresentation that its clearly stated purpose would not be given effect.

B. The Guild Made a Proper Request for Bargaining

As shown, *supra,* pp. 3-4, on April 26, the Guild sent a telegram to the Company informing it that the employees had designated the Guild as their representative. The telegram also stated that "the Guild requests that it be granted recognition as bargaining representative for editorial department employees". On the following day, the Company responded that it "declines to recognize your union as the collective bargaining representative of any of its employees."

Before the Board the Company argued that the Union's demand was technically defective because it did not state that the Union represented a "majority" of the employees, and because it did not offer a check of the authorization cards. But it is well settled that a request to bargain need follow no specific form as long as there is a clear communication of meaning, and the employer understands that a demand is being made.[34] Here, the Company's response plainly shows that it fully understood the Union's demand. In any event, the Company's belated, hypertechnical argument is without merit. The absence of the word "majority" in the Union's demand is not fatal. *Lincoln Mfg. Co.* v. *N.L.R.B.*, July 7, 1967, 65 LRRM 2913 (C.A. 7). Nor is the failure to offer a card check, *N.L.R.B.* v. *Security Plating Co.*, 356 F. 2d 725, 727 (C.A. 9). And, contrary to the Company's contention to the Board, "the filing of a representation petition does not absolve an employer from his duty to recognize and bargain with the Union . . ." *Bilton Insulation Inc.* v. *N.L.R.B.*, 297 F. 2d 141, 144 (C.A. 4). Finally, any defect in the Union's telegram was certainly cured by Schrader's visit to Curry two days later, when he again stated that he represented the editorial department employees and requested contract negotiations. Curry's response, as before, plainly shows that he understood that a demand had been made. See p. 5, *supra*.

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[34] *N.L.R.B.* v. *Fosdal*, 367 F. 2d 784 (C.A. 7); *N.L.R.B.* v. *Barney's Supercenter, Inc.*, 296 F. 2d 91, 93 (C.A. 3); *Scobell Chemical Co.* v. *N.L.R.B.*, 267 F. 2d 922, 925-26 (C.A. 2); *Joy Silk Mills* v. *N.L.R.B.*, 185 F. 2d 732, 741 (C.A. D.C.), cert. denied, 341 U.S. 914.

C. The Company Had No Good Faith Doubt of the Union's Majority Status

Having obtained authorization cards from a majority of the employees in the unit, the Guild notified the Company that it represented the employees and requested recognition as bargaining representative. Under settled principles, the Company was thereupon required to recognize and bargain with the Guild unless the Company had a good faith doubt of the Guild's majority status.[35] As this Court recently stated:

> The refusal [to bargain] may not be motivated by a desire to forestall collective bargaining and provide an opportunity to undermine the union's majority status and rid the Company of the union.

Security Plating, supra, 356 F. 2d at 727. Here, the record provides no basis for a claim of good faith. Rather, the Company's conduct, upon receiving the Union's request for recognition shows, we submit, that the Company credited the Union's claim that it represented the employees and then set out to destroy the Union's status. In any event, as this Court recently said:

> Even if respondent had some doubts as to the majority status of the union, its entering upon an unlawful course of conduct in violation of section

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[35] *N.L.R.B.* v. *Luisi Truck Lines, supra,* 66 LRRM at 2463; *N.L.R.B.* v. *Security Plating Company, Inc.*, 356 F. 2d 725, 727 (C.A. 9); *N.L.R.B.* v. *Hyde*, 339 F. 2d 568, 570 (C.A. 9); *Sakrete of Northern California, Inc.* v. *N.L.R.B.*, 332 F. 2d 902, 908-909 (C.A. 9), cert. denied, 379 U.S. 961, rehearing denied, 380 U.S. 926; *Colson Corp.* v. *N.L.R.B.*, 347 F. 2d 128 (C.A. 8), cert. denied, 382 U.S. 904; *N.L.R.B.* v. *Economy Food Center, Inc.*, 333 F. 2d 468, 471-472 (C.A. 7); *N.L.R.B.* v. *Overnite Transportation Co.*, 308 F. 2d 279, 283 (C.A. 4); *Florence Printing Co.* v. *N.L.R.B.*, 333 F. 2d 289, 291-292 (C.A. 4); *Irving Air Chute Co.* v. *N.L.R.B.*, 350 F. 2d 176, 182 (C.A. 2); *Joy Silk Mills* v. *N.L.R.B.*, 185 F. 2d 732, 741 (C.A. D.C.), cert. denied, 341 U.S. 914.

> 8(a)(1) and clearly directed at undermining whatever support the union had, . . . indicates that such doubt, if any, was not the key motivating factor in its refusal to bargain. To the extent that respondent had any good faith doubts it apparently was not anxious to resolve them until such time as it could be sure that . . . the union would not have a majority. [footnote omitted].

N.L.R.B. v. *Luisi Truck Lines, supra,* 66 LLRM at 2463-2464.

We submit that the Company's conduct, *supra,* pp. 16-22, provides an ample basis for the Board's conclusion that the Company's true purpose in refusing the Guild's request for recognition was simply to defeat the Guild regardless of its majority status. *N.L.R.B.* v. *Luisi Truck Lines, supra.*[36]

In these circumstances the Board concluded that a bargaining order was necessary to remedy the unfair labor practices. Clearly, such an order is an appropriate remedy for a refusal to bargain. *N.L.R.B.* v. *Luisi Truck Lines, supra,* 66 LRRM at 2464, and cases cited therein. The circumstances in *Luisi* are strikingly similar to those in the instant case. In *Luisi,* this Court once again noted that "the Board has wide discretion 'to determine how the effect of prior unfair practices may be expunged' *International Ass'n of Machinists,*

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[36] Accord: *N.L.R.B.* v. *Joy Silk Mills, Inc.,* 185 F. 2d 732, 741 (C.A. D.C.), cert. denied, 341 U.S. 914; *N.L.R.B.* v. *Overnite Transportation Co., supra,* 308 F. 2d at 283; *Bilton Insulation, Inc.* v. *N.L.R.B.,* 297 F. 2d 141, 144-145 (C.A. 4); *N.L.R.B.* v. *Inter-City Advertising Company,* 190 F. 2d 420, 421 (C.A. 4), cert. denied, 342 U.S. 908; *Amalgamated Clothing Workers of America (Hamburg Shirt Corp.),* 371 F. 2d 740 (C.A. D.C.); *N.L.R.B.* v. *Cumberland Shoe Corp.,* 351 F. 2d 917, 920-921 (C.A. 6); *N.L.R.B.* v. *Austin Powder Co.,* 350 F. 2d 973, 977 (C.A. 6); *N.L.R.B.* v. *Winn-Dixie, Inc.,* 341 F. 2d 750, 754-755 (C.A. 6), cert. denied, 382 U.S. 830.

etc. v. *N.L.R.B.,* 311 U.S. 72, 82." We submit that here, as in *Luisi,* there is nothing to indicate that the Board has abused its "wide discretion" in ordering the Company to bargain with the Union. "Were it otherwise, 'recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of this statutory obligation' *Franks Bros. Co.* v. *N.L.R.B., supra,* 321 U.S. at 705" *N.L.R.B.* v. *Luisi Truck Lines, supra,* 66 LRRM at 2464.

CONCLUSION

For the foregoing reasons, we respectfully submit that a decree should be entered enforcing the Board's order in full.

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NOVEMBER 1967

Certificate

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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Assistant General Counsel
National Labor Relations Board.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Representatives and Elections

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of emplyoment, or other conditions of employment:

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts

certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a

decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

INDEX TO REPORTER'S TRANSCRIPT

(Numbers are to pages of the reporter's transcript)
Board Case No. 31-CA-119

GENERAL COUNSEL'S EXHIBITS

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2	23	24	24
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36	503		
37	599	615	615
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40	630		
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RESPONDENT'S EXHIBITS

No.	Identified	Offered	Received in Evidence
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2	210	210	210
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12	795	795	796
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No.	Identified	Offered	Received in Evidence
1, 2	905	1009	1010
3	1010	1009	1010

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